Public Prosecutor v Haniff Basree Bin Abdul Rahim

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 46–54–2003
ABDULL HAMID EMBONG J
12 AUGUST 2004

Criminal Procedure — Prosecution — Prima facie case — Duty of court at close of prosecution's case — Maximum evaluation of evidence — Whether prima facie case established — Criminal Procedure Code s 180

The accused was charged with murder, an offence punishable under s 302 of the Penal Code. The deceased was found dead in her room at about 4.30am. The facts revealed that the deceased died of asphyxia due to choking and that there were no signs of struggle found on the deceased's body. It was also revealed that the deceased had sexual intercourse with the accused and one unknown male within 72 hours of her death. Pertinent other facts were that (a) the electrical cord and bra which were used to tie up the deceased contained the DNA profiles of an unknown male and that of the deceased; (b) the hairs recovered from the deceased's bedsheet and comforter matched the DNA profile of the same unknown male; (c) the fingernail clipping of the deceased revealed the presence of the DNA profiles of both the accused and the unknown male, proving that she had come into contact with both men. It is important to note that no fingerprint marks of anyone, including that of the accused, were found in the bedroom or any part of the house of the deceased.

The issue for consideration was whether the prosecution had made out a *prima facie* case.

Held, acquitting the accused:

(1) In determining whether at this stage of the trial, a *prima facie* case had been made out by the prosecution, the court is obliged to scrutinize evidence on a maximum evaluation yardstick in order to determine if those strands of evidence have satisfied the legal requirements to support a finding of a *prima facie* case (see para 60).

(2) At the conclusion of the prosecution's case, the court has to consider whether the prosecution has succeeded in establishing a *prima facie* case against the accused. In so doing, this court is bound by the maximum evaluation of the evidence as laid down in *Looi Kow Chai* to determine whether the evidence could be accepted as accurate to establish the essential elements of this offence facing the accused (see para 67).

(3) The story of the prosecution witnesses, on the evidence of the accused being the person last seen together with the deceased was rejected. Even if it were accepted, the mere fact that the deceased and accused were last seen together did not necessarily lead to an irresistible inference that the accused had committed the crime, although that circumstance is of an incriminating nature against the accused. There must be other circumstances that may go to show that the accused alone had committed the murder. These came in the form of scientific evidence (see para 61).

(4) The scientific evidence also fell short of the standard needed of establishing a *prima facie* case. In fact, the scientific evidence, especially the existence of the 'unknown male' being seemingly the last person to have been with the deceased, were laden with doubts (see para 61).

(5) In a criminal trial, defence is entitled to punch holes and create doubts even of the prosecution stage. In this case, the defence needed little effort to do so, because the scientific evidence on its own was destructive of the prosecution's case (see para 61).

[**Bahasa Malaysia summary**

Tertuduh disabitkan dengan pembunuhan, suatu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan. Mayat si mati dijumpai di biliknya lebih kurang pada 4. 30 pagi. Fakta menunjukkan bahawa si mati meninggal dunia kerana terdapat pengurangan oksigen di dalam badannya akibat tercekik dan tidak terdapat kesan gelutan pada badan si mati. Ia juga menunjukkan bahawa si mati telah melakukan persetubuhan dengan tertuduh dan seorang lelaki yang tidak dikenali dalam tempoh 72 jam sebelum kematiannya. Fakta penting yang lain adalah (a) kod elektrik dan baju dalam yang digunakan untuk mengikat si mati mengandungi profil-profil DNA seorang laki yang tidak dikenali, termasuk tertuduh; (b) beberapa helai rambut yang diambil daripada selimut dan gebar selesa si mati mengandungi profil DNA yang sama dengan lelaki yang tidak dikenali; (c) keratan kuku si mati mendedahkan kehadiran profil DNA tertuduh dan lelaki yang tidak dikenali yang sama, sambil membuktikan bahawa dia telah membuat hubungan dengan kedua-dua lelaki tersebut. Adalah juga penting untuk dimaklumkan bahawa kesan cap jari sesiapapun, termasuk tertuduh, tidak dijumpai di bilik tidur mahupun di bahagian lain rumah si mati.

Isu yang perlukan diputuskan adalah sama ada suatu kes *prima facie* berjaya dibuktikan oleh pihak pendakwa.

Diputuskan, membebaskan tertuduh:

(1) Dalam merumuskan sama ada suatu kes *prima facie* berjaya dibuktikan oleh pihak pendakwa raya pada peringkat pembicaraan ini, mahkamah seharusnya meneliti bukti berdasarkan penilaian maksima dalam memutuskan sama ada elemen bukti yang diutarakan telah memenuhi kehendak undang-undang untuk menyokong kewujudan kes *prima facie* (lihat perenggan 60).

(2) Pada akhir kes pendakwa, mahkamah harus mempertimbangkan sama ada pihak pendakwa raya berjaya membuktikan bahawa terdapat kes *prima facie* terhadap tertuduh. Dalam berbuat begitu, mahkamah ini terikat dengan prinsip penilaian maksima bukti yang diputuskan dalam kes *Looi Kow Chai* untuk memutuskan sama ada bukti boleh diterimapakai sebagai tepat untuk membuktikan elemen-elemen penting kesalahan tersebut berhadapan dengan tertuduh (lihat perenggan 67).

(3) Kenyataan saksi pendakwa raya, berkenaan bukti yang tertuduhlah orang terakhir dilihat bersama si mati, ditolak. Jika pun ia diterima, fakta bahawa si mati dan tertuduh dilihat bersama pada saat-saat terakhir tidak semestinya membawa kepada kesimpulan yang tidak boleh

dipertikaikan bahawa tertuduh telah melakukan pembunuhan tersebut, walaupun keadaan sekeliling menunjukkan seolah-olah tertuduh telah melakukannya. Harus wujud keadaan-keadaan lain yang menunjukkan bahawa hanya tertuduh telah melakukan pembunuhan tersebut (lihat perenggan 61).

(4) Keterangan saintifik juga berkurangan atas beban bukti yang diperlukan untuk membuktikan kes *prima facie*. Sememangnya, keterangan saintifik, terutama sekali kewujudan "lelaki yang tidak dikenali" yang tampak pada lahirnya orang terakhir bersama si mati, dipenuhi dengan keraguan (lihat perenggan 61).

(5) Dalam sesuatu perbicaraan jenayah, pihak pembela berhak untuk mewujudkan keraguan, walaupun pada peringkat pendakwaan. Dalam kes ini, pihak pembela tidak perlu berusaha lebih untuk berbuat begitu, kerana kewujudan keterangan saintifik dengan sendirinya telah memusnahkan kes pendakwa (lihat perenggan 60).

Notes

For cases on *prima facie* case, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2574–2577

For procedure after conclusion of prosecution's case, see 18 *Halsbury's Laws of Malaysia*, para 310.323

Cases referred to

Arulpragasan Sandaraju v Public Prosecutor [1997] 1 MLJ 1 (refd)
Chang Kim Siong v Public Prosecutor [1968] 1 MLJ 36 (refd)
Dato' Mokhtar bin Hashim & Anor v Public Prosecutor [1983] 2 MLJ 232 (refd)
Idris v Public Prosecutor [1960] MLJ 296 (refd)
Khoon Chye Hin v Public Prosecutor [1961] MLJ 105 (refd)
Lim Guan Eng v Public Prosecutor [1998] 3 MLJ 14 (refd)
Looi Kow Chai & Anor v Public Prosecutor [2003] 2 MLJ 65 (folld)
Mohamed bin Kasdi v Public Prosecutor [1969] 1 MLJ 135 (refd)
Ng Thian Soong v Public Prosecutor [1990] 2 MLJ 148 (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561 (refd)
PP v Sarjit Kaur a/p Najar Singh [1998] 1 MLJ 184 (refd)
Public Prosecutor v Saimin & Ors [1971] 2 MLJ 16 (refd)
Sunny Ang v Public Prosecutor [1966] 2 MLJ 195 (refd)
Lejzor Teper v The Queen [1952] AC 480 (refd)

Legislation referred to

Criminal Procedure Code ss 112, 179, 180

Appeal From: Arrest No B81–16–2003 (Magistrates Court, Kuala Lumpur)

Stanley Augustin DPP (Roszianayati Ahmad & Puan Nahra Dollah with him) (AG's Chambers) for the prosecution
V Sithambaram (Mohd Haaziq Pillay, Rajivan Nambiar & Robert Devan with him) (M/s Sitham & Associates) for the accused

Abdull Hamid Embong J:

THE CHARGE

> "Bahawa kamu pada 5 Disember 2003 di antara jam 1.30 pagi hingga 4.00 pagi di No. D-7-1, Kondominium Puncak Prima, Galleria, Jalan 17, Sri Hartamas, di dalam Daerah Brickfields, di dalam Negeri Wilayah Persekutuan, Kuala Lumpur, telah melakukan bunuh terhadap Noritta binti Samsudin, KP: 810211-02-5166 dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 302 Kanun Keseksaan yang boleh dihukum di bawah seksyen yang sama."

[1] On 1 July 2004 this court had decided to acquit and discharge the accused without him having to enter his defence. On 2 July 2004 the learned public prosecutor filed an appeal against that decision.

FACTS

[2] In the early morning of 5 December 2003, at about 4.30am the deadbody of Noritta binti Samsudin was found in her room at unit D-7-1 Kondominium Puncak Prima, Galleria, Sri Hartamas. Her body was found faced downwards on the mattress on the floor of her room. Her head was inside a tied pillow case, both her hands were tied together with an electric iron cord, behind her back, and her legs were also tied with an electrical cord and a bra. She was completely naked but the body was covered with a comforter when she was first seen. Her house, unit D-7-1 is located on the seventh floor of Block D in the condominium. It has three rooms. One room with a bathroom attached was shared by Kenneth Michael Yap (Kenneth ie SP12) and Nor Azora binti Abdul Hamid (Nor Azora ie SP28). The deceased occupied another room alone and she had moved in around July 2003. It was spartanly furnished, with one mattress on the floor, a table lamp and a few decorative items. The room had an air conditioner but without an attached bathroom. The third room was used as a store room. The unit had a combined living room and dining area. There was a kitchen and a common-use bathroom. There was a sliding door at the end of the living room with curtains. It was a compact apartment but neatly furnished.

[3] The deceased had worked as a business development executive drawing a salary of RM1,500 and an allowance of RM500 per month. On 4 December 2003, after attending a Hari Raya open house with her employer (SP7), she went home and stayed in as she was suffering from flu. This was also confirmed by her very close friend, Lim Sin Kean Childs (SP6) who received a call from the deceased on 4 December 2003 after lunch informing him that she was on medical leave for that day. SP6 also called the deceased on 4 December 2003 at 6.30pm and she told him she had been sleeping.

[4] The deceased paid a monthly rental of RM550 to either SP12 or SP28 as a joint tenant to the house. Kenneth worked as a disc jockey in a discotheque called Nouvo and Nor Azora worked as a guest relations officer at a karaoke lounge called Crystal Club. It was normal for them to return home early in the morning.

[5] On 5 December 2003 at about 4.30am Kenneth and Azora arrived home together. They found the house not lighted up which surprised Kenneth as normally the understanding between the housemates was to leave the dining room light on upon leaving the house. The house was however dimly lighted by the beam of the street lights coming in through the sliding door in the living room but it was too dark for Kenneth and Azora to recognize anyone passing by them in that condition. Both Kenneth and Azora had not bothered to switch on the light (the switch being some distance away) upon entering their house as they were both heading straight for their bedroom and that they could grope their way even in that partial darkness.

[6] Upon unlocking the main door and entering the house both of them noticed a strong, unpleasant body odour at the main entrance area and the corridor leading to the dining table. Kenneth checked the shoe rack area to see if there were any visitor's shoes which emitted the repulsive smell but saw none. Nor Azora's reaction to the smell was that she thought the deceased had a visitor. It was the first time she had encountered that repulsive smell. Upon entering, Kenneth locked the main door and both of them proceeded to their bedroom with Nor Azora walking about five feet behind him. When Kenneth unlocked their bedroom door he noticed that the deceased's room was closed but it was not lighted. While walking to their room, Nor Azora had noticed a silhouette of a man to her right but ignored what she saw. Kenneth and Nor Azora had been out drinking that night. She had consumed two stout and also shared Kenneth's beer. She said she was a bit 'high' but was aware of things. Kenneth also said that Azora can drink 'a fair bit but she can hold her drinks'.

[7] When Kenneth opened their bedroom door he switched on the room light. Upon entering their room Nor Azora asked Kenneth if he had seen someone in the house. He said he didn't and did not pay much attention to Nor Azora's question as he thought it was just her imagination. Nor Azora felt uneasy and left the bedroom to look for the man she thought she had seen earlier. She went out to the hall area and the kitchen but found no one. She then realized that the main door had been unlatched, whereas Kenneth had earlier locked the door. Nor Azora felt funny and asked Kenneth to enquire from the guards if any visitor had come to their house. Together they called out the deceased's name but got no response. When Kenneth went down to the guardhouse to enquire, Nor Azora noticed that the deceased's room door was slightly ajar. She peeped into the room and switched on the light but did not instantly notice the deceased's body lying under the comforter. She saw some items in the room strewn on the floor and called out the deceased's name. She then pulled the comforter and saw the deceased's body lying in a position earlier described. Nor Azora panicked and ran to her room and shouted from her bedroom window to Kenneth who was then downstairs at the guardhouse, asking him to come up quickly.

[8] She then ran out to the neighbour's house to call for help but there was no response. She then went back to her room to again call to Kenneth, but on that occasion, did not see him.

[9] At the same time she saw the figure of a man downstairs walking towards the guardhouse and putting his shirt on and thought he was the same man she had seen earlier in her house. She shouted at the person "bastard, stop, I think you are a killer". She also called on her mobile phone, her Finnish friend, Mikko, who with whom she had had a drink earlier that night.

[10] Nor Azora then shouted to the guards at the guardhouse asking them to stop the man she saw downstairs. There was no response from the guards. She then rushed out of her house to go downstairs and look for that person. When she reached the lift, Kenneth and a security guard she identified as Maniam had arrived. When Kenneth reached the 7th floor, Nor Azora rushed into the lift and took the lift down together with Maniam, saying something to Kenneth which he could not make out. A confused Kenneth took another lift down again to ask Nor Azora what had happened. Nor Azora told him that she had seen a man walking towards the guardhouse whom she believed to be the same man she had earlier seen in their house. Kenneth then asked (SP11) Thanabalan, the chief security guard to follow him up. When Kenneth entered the deceased's room he found her in the same position as described by Nor Azora. He called out her name "Ita" but she did not respond. He then untied the pillow case covering her head. He found a bolster case tied around her face, covering her mouth, and untied the knot at the back of her head. When that was undone a piece of face towel crumpled into a ball (P16) fell out of the deceased's mouth. Kenneth then cut off the cord tied around the deceased's hands with a knife he had fetched from the kitchen. SP11 was in the room with Kenneth but did not assist him. Kenneth kept calling out the deceased's name but there was no response. Mikko then arrived into the room and told Kenneth that the deceased's lips had turned blue and suggested a CPR on her. Kenneth said he did not know the procedure and Mikko suggested that SP11, the security guard may know how to do it. When asked, SP11 refused. Mikko then turned over the deceased's body and together with Kenneth tried to resuscitate the deceased with a CPR but they failed to revive her.

[11] In their evidence both Kenneth and Nor Azora had stated that they knew the accused. Nor Azora had also seen the accused in her house twice before. Both of them had taken a lift in the accused's car before and had had drinks with him. Nor Azora also positively stated that she could recognize the accused anywhere because she was familiar with him. Nor Azora also stated that the accused usually visited the deceased once or twice weekly (see p. 354C NOE). It may be convenient at this juncture for this court to find this assertive statement from Nor Azora, as being in direct contradiction to Suzaki's assertion that the accused visited the deceased five to six times weekly in the month prior to her death. (Suzaki is the security guard who testified as SP10, see later). Kenneth also agreed that the accused person had an imposing figure in height and built and that it would be easy to spot him.

[12] As for the odious body odour that they smelt upon entering their house, both Kenneth and Nor Azora testified that they had not smelt that odour before. Under cross-examination Nor Azora also affirmatively stated that on the occasions she was together with the accused, including the time when she was together with him in his car, she had not noticed any body odour

emitted by the accused. In fact from her demeanour when the question was put to her by learned counsel (see p 352F, NOE) she smiled, which in my view suggested that she thought that the question was amusing. Kenneth too had previously taken a lift from the accused in the latter's car and had not noticed that the accused had any body odour.

[13] As for the man Nor Azora saw from her room moving towards the guardhouse, she described him to be a dark-skinned person and thought that he was an Indian, although she could not be certain. From where she stood she could identify him as a male from his hair (see p. 347E, NOE). She agreed with learned counsel's suggestion under cross examination that the accused's complexion was not that dark. Nor Azora also stated that amongst the deceased's former boyfriends, the accused usually spend the night with the deceased in the one or two months prior to her death. She knew this as she had regularly seen the accused's Toyota Harrier car parked outside the condominium, normally at around 3 or 4am. The deceased too had told her that the accused spent the night over and Nor Azora herself had seen the accused's shoes at the shoe rack in the house.

[14] Kenneth had called 999. The police arrived almost immediately, at about 5am. Two uniformed officers initially conducted enquiries from Kenneth. The ambulance arrived some 15 to 20 minutes later. Not long after at about 6am the Investigating Officer, ASP Shahrul Lalli Masduki (SP29) arrived. Waiting for him at the scene of the crime was ASP Prabakaran (not called as a witness), Insp Nachimuthu and L/Kpl Samsudin (SP9). The deceased body was removed by the ambulance team not long afterwards. The earlier mentioned two officers were investigation officers on duty that night and thus had been to the crime scene to conduct initial investigations. Unfortunately the prosecution chose not to call ASP Prabakaran to unfold this crucial part in the narration of its case. There is thus a gap in the prosecution's case as to what happened in the deceased's bedroom prior to the arrival of the investigating officer (SP29) about an hour later, particularly in respect of the handling of the exhibits. The defence had asked SP29 about the deceased's mobile phone which had gone missing and from which it could be traced who had made calls to the deceased on 5 December 2003. In the absence of ASP Prabakaran no explanation was available on this defence query. One Insp Nachimuthu was called as SP32. Presumably this was the same Insp Nachimuthu referred to by SP29 as one of the initial investigating officer who was present together with ASP Prabakaran at the scene of crime. However no evidence was adduced by the prosecution of the query on the missing mobile phone put by the defence to SP29 in his earlier testimony. The photographs at the scene of crime were only taken at 8.30 p.m., some three hours after the arrival of the initial investigating team.

[15] ASP Shahrul Lalli undertook immediate investigation in the deceased room and the living room of the house. He had the assistance of two police personnel from the forensic section and a police photographer (SP9) who also did fingerprint dusting. Various articles were taken from the deceased's room for follow through investigations. Amongst them were three samples of the mattress from which the deceased's body was recovered, samples found to contain semen stains. Also recovered were 11 pieces of tissue papers

found in a waste basket in the deceased's room. All the articles used to tie up the deceased were also seized for investigation. The fingerprint dusting, both in the deceased's room, the door to her room and the entrance door, proved negative as there were insufficient prints found for any lifting.

[16] There was no detailed evidence produced on the removal of the body, save the narrative from Kenneth that the ambulance personnel arrived after ASP Shahrul who in turn, stated shortly that the deceased was brought to the Universiti Hospital initially but was transferred to Hospital Kuala Lumpur (HKL) for post-mortem examination.

POST-MORTEM AND CAUSE OF DEATH

[17] The post-mortem examination was conducted at 12.30pm on 5December 2003 at HKL by the Director of Institut Perubatan Forensik, Dr. Abdul Halim bin Mansar (SP13), who undertook a thorough external and internal examination on the deceased's body. From various spots of multiple petechial haemorrhages found on different parts of the deceased's body such as her chin, eyes, fingernails, Dr. Abdul Halim opined that the deceased had died of asphyxia.

[18] On the traces found on the deceased's legs from the knots tied around her arms and legs, SP13 had come to an opinion that the knots were fastened after the death of the deceased in view of the non-existence of vital signs such as bleeding or blood spots which he said would be a normal reaction to such an act (see pp 187, 188 NOE). As for the bruises found on both the deceased's thighs SP13 opined that they were caused by possibly pressure from someone who is big and heavy and that they were caused before her death. The pressure possibly came from someone pressing his knees on those areas.

[19] SP13 found old hymen tears meaning more than 72 hours, at 3, 6 and 9 o'clock in the external genitalia of the deceased. Tears at similar locations were also seen in the anus save that they were recent tears, ie less than 72 hours and blood marks were also detected there. These tears could have been caused by something blunt like a penis or finger. In the deceased's vagina, SP13 found an unusually large amount of fluid which was a collection of semen and the deceased's fluid. He opined that sexual intercourse had occurred prior to the deceased's death.

[20] Upon internal examination, SP13 found bruises on the tongue and haematoma at the left side of the epiglottis ie the tissue at the base of the tongue. SP13 opined that a piece of face towel like P16A & B forced into the deceased's mouth could have caused those injuries. The thyroid gland was congested; SP13 stated that forcing P16A & B into the deceased's mouth could have caused her death since the collapse of her tongue from that force could cause the deceased to choke. SP13 also stated that the death was wilfully caused and ruled out accidental death in view of the injuries to the tongue sustained by force. SP13 however observed that there were no signs of clawing or fracture and that the negligible injuries found suggested that the sexual acts were consensual.

[21] Under cross-examination, SP13 disagreed with learned counsel's suggestion that the deceased had died of sexual asphyxia which is an act of deliberate induction or enhancement of orgasm by self-hypoxia. This act, he explained, is normally done by males upon themselves and that its common feature is self inflicted injuries which he could not detect in this case. SP13 also opined that the severe injuries found on the deceased's tongue caused by force, had ruled out the possibility that she died of sexual asphyxia.

[22] SP13 also took various specimens of the deceased's blood, vaginal swabs, fingernails and anal swab on the request of the investigation officer and these were all sent to the Chemistry Department Petaling Jaya for DNA testings.

DNA

[23] Mr Lim Kong Boon, the government Chemist (SP14) and Head of Crime DNA Unit at the Serology and DNA Section of the Chemistry Department Petaling Jaya, received from ASP Shahrul Lalli a total of 116 specimens and items, from all but four were analysed for DNA profiling. According to SP14, DNA (deoxyribonucleic acid) which is a genetic material found in the nucleus of the cells, which molecules make up the chromosomes is actually the blueprint of all human beings. DNA profiling is a technique where a person's DNA is analysed. He explained that no two persons, except for identical twins have identical chromosomes. SP14 also explained in elaborate detail on the process and methodology of obtaining a DNA profile. He also stated that a DNA profiling with almost positive certainty, would be able to identify someone whose evidence sample is the same as the reference sample. There were a number of crucial findings by SP14 that needed to be mentioned here for a proper appraisal of the case against the accused.

1. On exh P16A ie one of the two pieces of face towel that popped out of the deceased's mouth there were found the mixed DNA profiles of at least three persons, namely the deceased as a major contributor (70% to 75% composition of the DNA extracted of the mixed stain), the accused as an intermediate contributor (20% to 25%) and an unknown person he termed as a minor contributor (about 5%).

   On exhibit P16B, the other piece of face towel that came out of the deceased's mouth, was found the DNA profile of the deceased. The DNA profiling was done by making comparisons with the DNA profiles developed from the reference sources ie the accused's and the deceased's blood samples.

2. From the bolster cover (P15) the DNA profile developed from the seminal stains found thereon was that of the accused's. From the non-sperm cells DNA extracts from the semen stains, DNA profiles of the accused and the deceased were found.

3. From the 11 pieces of tissue papers (P29 a–k) recovered from the waste basket in the deceased's room, 8 pieces were found to bear seminal stains, with spermatozoa, and the DNA profile was that of the accused's. The non-sperm cell DNA extracts from the semen stain contained the mixed DNA profiles of both the accused and the deceased.

SP14 also conducted a simple experiment on similar porous tissue papers and found that the seminal fluids dropped on them would dry up within half an hour to an hour depending on the amount of semen drops applied.

4. In respect of the bedsheet (P19), from both the sperm and non-sperm cells DNA extracts of the seminal stains found on it, it bore the DNA profiles of both the accused and the deceased.

5. From the comforter (P13) the seminal stains were also found to bear the DNA profiles of both the accused and the deceased.

6. From the cut portion of the mattress (Exhs P72A, P73A and P74A) the DNA profiles of the accused and the deceased.

SP14 also opined that since spermatozoa were detected on P72A and 73A and from the mixed DNA profiles of the accused and the deceased found on the cut mattress, (P72A, P73A, P74A) bolster case, bedsheet, comforter and tissue papers, it could be concluded that sexual intercourse had taken place.

7. On the bolster (P38), semen stains were found which did not match the DNA profiles of any of the blood stains specimens that SP14 received, but a male DNA profile was detected which SP14 named as "Unknown Male 1".

8. On the black bra (P82), SP14 also found it to contain the DNA profile of the same "Unknown Male 1", from his analysis of the semen stain found on it.

9. From the fingernail clippings of the right hand of the deceased the DNA profiles developed was that of the accused and the deceased. From the fingernails of the deceased's left hand there were the DNA profiles of the deceased, the accused and the "Unknown Male 1".

10. On the strands of hairs (P35) recovered by Insp Nizam of the police forensic team, from the deceased's comforter and bedsheet, the DNA profile was that of the "Unknown Male 1" matching that DNA profile found on the bolster (P38).

11. From the electrical cord (P17A) used to tie the legs of the deceased there was developed the mixed DNA profiles of the person SP14 identified as "Unknown Male 1" and the deceased.

12. From the black liquid (P70) ie the rectal swab of the deceased (the black liquid being a preservative), the DNA profile was that of the same "Unknown Male 1".

13. From the cotton swab (P88) SP14 found a mixed DNA profile of both the deceased and the same "Unknown Male 1".

14. From the vaginal swabs (both high and low ends) of the deceased (P25), a mixed DNA profile of three individuals being the accused, the deceased and the "Unknown Male 1" was found. From the high vaginal

swab the contribution of the seminal stain, in percentage was concluded by SP14 in the following proportions —

i) Major contributor, 60% to 70% — the accused.

ii) Intermediate contributor, 20% to 25% — the deceased.

iii) Minor contributor, 10% to 15% — 'Unknown Male 1'.

SP14 said based on that it normally indicated that the accused was the last person to have had sexual intercourse with the deceased, and would be dependent on a number of factors, such as —

i) The volume of semen ejaculated into the vagina;

ii) The number of spermatozoa contained in the ejaculated semen; and

iii) The lapse of time between the two sexual intercourse where semen was ejaculated into the vagina.

SP14 however cannot say with absolute certainty that the accused was the last person to have sexual intercourse with the deceased. SP14 also stated that there was a greater concentration of DNA material in high as opposed to the low vaginal swab. He also agreed with learned counsel in stating that the sperm and other DNA materials remain for a longer period in the upper vaginal region as opposed to the low vaginal region, and that immediately after ejaculation there would be a higher concentration of sperm in the lower vaginal region. SP14 was unable to say if the sexual intercourse had occurred before or after the deceased's death. From the rectal swab SP14 also confirmed that there had been anal sex which he said was performed by the "Unknown Male 1" but he could not say if that happened prior to or after the deceased's death.

SP10 And SP11 Evidence

[24] The evidence of Suzaki bin Supok (SP10) and Thanabalan a/l Kobal (SP11) is crucial to the foundation of the prosecution's case. They were both security guards on duty at Prima Puncak Galleria Condominium on that fateful morning of 5 December 2003. To enter the condominium premises one has to go through the guardhouse strategically located at the front of the apartment blocks. Immediately outside the guardhouse is a parking area. Guests park their cars there and have to walk through the guardhouse and register themselves upon visiting any of the apartments. There is a pedestrian entrance adjoining the main gate. The guards will either communicate with the tenant to come down and accompany his visitor up, in which case the visitor need not register himself. Otherwise a visitor needs to register his visit at the guardhouse by leaving his identity card and be issued a visit pass. The time of the visit will also be recorded. The security guard will then communicate with the tenant or owner to enquire if he consented to the visitor coming in and if so the visitor would be allowed in. There are instances however where a visitor who is already a familiar face to the guards, will be allowed in even without being registered or escorted by the owner or tenant he is visiting.

[25] SP10 in his testimony stated that at 1am on 5 December 2003 he saw the accused, for the first time that day, coming out from the condo together with the deceased and walked out through the pedestrian gate located at the

guardhouse. SP10 was then inside the guardhouse whilst SP11 stood just outside it. SP10 first stated that the accused had gone out to meet someone there (see page 39 NOE). He later stated that both of them had gone out of the compound to the car park area situated directly in front of the guardhouse to chit-chat with four Malay persons, two males and two females who had arrived in a white Kancil car. The Kancil was parked directly in front of the guardhouse, under a street light and the area was well lit. SP10 could even see the registration number of the Kancil although in his evidence he said he had forgotten the number. The accused and the deceased spoke with the four persons for some 10 to 15 minutes. They then walked back into the condo through the pedestrian gate.

[26] According to SP10 he had seen the accused and the deceased regularly arriving together at the condo at around 2am. and that the accused would leave around an hour later. He remembered the accused coming to the condo 5 or 6 times a week for a month prior to the death of the deceased. The deceased was therefore a familiar person to him. So familiar was the accused to him that SP10 could remember that on 4 December 2003 the accused and the deceased arrived at a about 2am and that the accused was wearing blue jeans and a white T-shirt. And on 5 December 2003 he also remembered what the accused wore in minute details ie jeans and a white T-shirt with collar and grip-arms. He also remembered that the deceased wore knee length grey coloured shorts and a long T-shirt. He also recalled that the accused and the deceased behaved like lovers.

[27] After the discovery of the deceased's body, the police arrived almost immediately, at about 5am. It was established that one Insp Prabakaran and a few other police personnel (not called as a prosecution witness) conducted initial enquiries at the scene of crime (see p 67 NOE). One police officer had also asked SP10 what the latter had seen but SP10 did not inform him that he had seen the accused together with the deceased, earlier at 1am. On the afternoon of 8 December 2003, at the Police Station, SP10 was again interrogated by one Insp Vijay (also not called as a prosecution witness). When asked by learned counsel under cross-examination whether by then he knew of the deceased's death he answered that he could not remember. However he said that he had been informed while at the guardhouse that morning that there had been a murder, but was not informed who the victim was. SP10 also admitted that Insp Vijay had asked him whether he had seen the deceased on 5 December 2003 but he did not inform Insp Vijay that he had earlier seen the deceased. He also did not tell Insp Vijay that he had seen the accused and the deceased speaking with four friends at the car park opposite the guardhouse.

[28] When questioned by learned counsel why he, as a security guard, did not see it as his responsibility to inform the police earlier as to what he had seen on 5 December 2003, SP10 explained that his thought was then confused. When asked why he was in that state of mind his answer was that he could not believe that Noritta was dead. This was in direct contradiction to what he had earlier testified ie that he was not then told who the victim was. SP10 however disagreed with counsel when it was put to him that his story about seeing the accused with the deceased on the morning of 5 December 2003 was made-up.

[29] SP10 further stated that it was only on the evening of 18 October 2003 when he was arrested and after being interrogated that he recalled what had happened on 5 December 2003. He explained that prior to his arrest, he had informed his superior, one Mr. Siva (not called as a prosecution witness) that he had seen the accused together with the deceased on 5 December 2003. Siva then informed the police that SP10 wished to make a further statement in addition to the one he gave Insp Vijay on 8 December 2003, resulting in SP10 being arrested. SP10 however admitted that his memory of the incident was jolted after the police had repeatedly asked him about what he saw on 5 December 2003. As for his arrest, and to digress a moment, SP29, ASP Shahrul Lalli, the investigation officer, explained to the Court that it was necessary to arrest SP10 at 11pm on 18 December 2003 when he was brought in to the police station to furnish further information as to what he saw on 5 December 2003. The investigation officer's explanation was that since it was getting late and there was no assurance that SP10 would return the following day to give a statement, it was convenient to place him under arrest. this court found this explanation quite incredible and shocking. SP10 had volunteered to give a further statement to assist the investigations, and at 11pm, under the excuse of lateness and convenience, he was arrested and detained in police custody until 20 December 2003, without even an offer for release on police bail.

[30] Back to SP10. He agreed with counsel who put to him that from 5December 2003 until 18 December 2003, prior to his arrest he had only informed the police that he had seen the accused coming in and going out of the condominium only up till 4 December 2003, and even though the police had suggested to him that he had seen the accused on 5 December 2003 he had told them that he did not see the accused on that day. After his release on 20 December 2003, ASP Shahrul recorded his statement which he stated is the same factual narrative as his testimony in court.

[31] Under re-examination by the learned deputy as regards his "loss of memory" that he actually saw the accused on 5 December 2003, SP10 explained his temporary amnesia and his subsequent recollection of the events, in the following manner, as extracted from the transcript of the notes: (see p 78 NOE)

> Bila saya kata telah hilang fikiran tentang OKT antara 5 ke 18 Disember 2003, maksud saya ialah saya tak ingat.
>
> S: Bagaimana kamu ingat semula?
>
> J: Selepas setiap malam saya duduk dalam guardhouse dan fikir betul-betul, baru saya ingat balik.
>
> S: Dalam kes ini, adakah kamu keliru atau lupa bahawa kamu ada nampak OKT dan Noritta pada 5 December 2003?
>
> J: Pada 18 December 2003 semasa saya ditangkap saya ingat, sebelum itu saya tak ingat.

The above explanation in the court's view materially contradicts what SP10 had earlier stated in his evidence during cross-examination where he stated, when put to him the following question: (see p 61 NOE)

"Katakan: Jika polis tak tangkap awak sebagai suspek dengan kemungkinan encik sendiri dituduh, encik tidak akan beritahu polis akan peristiwa pada 5 Disember 2003?

J: Pada malam saya kena tangkap, sebelumnya saya telah beritahu ketua saya supaya beritahu Mr Vijay bahawa saya ingat pada malam 5 Disember 2003 saya ada nampak OKT bersama Noritta. Bukan selepas saya kena tangkap baru saya ingat."

And, during further cross-examination which this court had allowed upon the application of learned counsel, he said:

"S: Bila awak beritahu Siva berkenaan apa yang awak nampak pada 5 Disember 2003?

J: Pada 17 Disember 2003 atau 18 Disember 2003 tak ingat haribulannya."

This court's impression of SP10 on this crucial aspect of the evidence ie thesighting of the accused together with the deceased at around 1am on 5December 2003, is that he was not truthful in his testimony. SP10 spoke fluently in Malay and had no problems with the questions put to him by either the learned deputy or counsel. He stood out as a confident witness initially answering questions put to him without any hesitation. Under cross-examination however he faltered and wavered exposing his dubious and evasive side and at times contradicting himself.

[32] An example of his positiveness on this important aspect of the evidence was his certainty of the time ie 1am (see p 39 NOE) when he saw the accused and the deceased coming out from the condo to meet up with the four persons at the car park in front of the guardhouse. He was also certain in his recollection on what apparel the accused wore that morning even to the minute details such as that the T-shirt with collar had a rubber grip sleeve. He also remembered the colour of the deceased shorts. Remarkably he also remembered the clothing and their colours the accused had worn the day before when he said he saw him at 2am on 4 December 2003. He also positively stated that he had seen the accused arriving at the condo five to six times a week in the one month prior to the deceased's death and that he would normally arrived at 2am and left an hour later.

[33] However this important sighting by SP10 on 5 December 2003 was not informed to the police even as early as about 5am that morning when the police arrived and did some initial questioning on him. When cross-examined by learned defence counsel on his sudden memory lapse, SP10 gave evasive and dubious answers exposing his vacillating attitude especially on the aspect of the initial enquiries by the police, as can be seen from the following part of the notes of evidence: (see pp 54–56 NOE)

"S: Selain awak, guard mana di reman?

J: Saya, Thanabalan, Maniam pada 19 Disember 2003.

Ya, saya balik ke guard house jam 4.30 pagi dan duduk di situ sehingga 7.00 pagi.

S: Apa perkara luar biasa berlaku?

J: Polis datang, ramai. Tak pasti jumlahnya.

S: Berapa kereta polis?

J: Tak ingat.

S: Pukul berapa kereta polis pertama yang masuk ke kondo?

J: Lebih kurang pukul 4.45, sebelum 5 pagi.

S: Berapa orang dalam kereta itu?

J: Tak ingat.

S: Dari 4.30 pagi hingga 7 pagi ada polis soal awak?

J: Ada.

S: Siapa soal?

J: Tak ingat.

S: Berapa orang soal awak?

J: Seorang.

S: Di mana disoal?

J: Dalam guard house.

S: Apakah soalannya?

J: Tak ingat.

S: Pukul berapa soalan itu dimulakan?

J: Tak pasti.

S: Soalan utama oleh polis ialah "Adakah awak nampak Noritta masuk atau keluar dari gate?"

J: Tak setuju.

S: Ada polis beritahu yang Noritta telah dibunuh?

J: Tak ada, pada masa itu.

S: Apa polis soal?

J: Tak ingat.

Put: Awak enggan menjawab sebab keterangan awak akan perkara yang berlaku pada 5 Disember 2003 adalah palsu dan direka?

J: Tak setuju.

S: Awak ingat pakaian OKT?

J: Ya.

S: Berapa lama encik disoal?

J: 1 minit.

S: Berapa soalan?

J: Tak tahu, tak ingat."

[34] His explanation that he came to recollect his sighting on the accused and the deceased that morning on 5 December 2003, only after a great deal of contemplation when he sat down each night at the guardhouse from 5 December 2003 until 18 December 2003, is to this court, an utter fabrication, and in direct contradiction with his clear memory of the other details of the events, which he had previously so articulately narrated, as discussed above. This court found this explanation as totally unacceptable and unbelievable, and one as exposing his dubious and unreliable character.

SP11

[35] SP11 is Thanabalan a/l Kobal who testified in fluent English. He was the security officer at the condominium and on 5 December 2003 was the officer in charge of four other personnel for the night shift from 7pm till 7am. As regards the procedure on receiving visitors, SP11 gave the same evidence as related by SP10. At about 12.45am after doing his patrol duty SP11 came back to the guardhouse and asked the other security guard Maniam to go on patrol. SP11 stayed in the guardhouse with SP10. When he returned to the guardhouse he said he saw a Kancil car waiting at the car park across the road in front of the guardhouse. He saw four Malay persons, two men and two women, in the Kancil. He then saw the accused and the deceased, both of whom he recognized, talking to these four persons for about 10 minutes at the spot where the Kancil had parked. SP11 said he was familiar with the accused as he had seen him on a number of occasions coming into the condominium together with the deceased. The accused would come after 1am together with the deceased and then leave alone after an hour. He said that from 2 October 2003 and 5 December 2003 he saw the accused roughly 20 to 30 times, but never spoke with him.

[36] SP11 stated that he remembered the clothes worn by the accused and deceased that morning. He wore blue jeans and light grey coloured T-shirt and she was in black shorts and singlet. He also stated that he first saw the accused and the deceased at 1am on 5 December 2003. He had not seen the accused arriving at the condominium or leaving it that morning. When cross-examined by learned counsel SP11 admitted that at first he cannot be certain that it was the accused who stood near the Kancil but when he and the deceased walked in through the pedestrian entrance at the guardhouse, walking hand in hand with the deceased, he was positive that it was the accused. He agreed with learned counsel's suggestion that seeing the accused that morning was an important event, in view of the incident of the deceased's death which he found out later.

[37] At 4.15am SP11 heard Nor Azora screaming from her balcony on the seventh floor. Nor Azora then came down to the guardhouse to ask him "ada orang lari di depan awak, tak nampak ke?". He told her he had not seen anyone. Kenneth then asked him to follow him up to his house which SP11 did. In the house SP11 looked into one room and saw nothing. In the deceased's room he saw a body covered with a comforter. The head was inside a pillow case. He heard Kenneth calling out the deceased's name "Ita" and untied the pillow case around the deceased's neck. SP11 said that Kenneth then called the police and asked for an ambulance to be sent. This part of the narrative by

SP11 is clearly an exaggeration since Kenneth in his testimony had stated that he did not know who called for the ambulance (see p 182 NOE). Not long after Mikko arrived and SP11 was asked by Kenneth to give the deceased a kiss-of-life. He said he cannot do it and was asked by Kenneth to leave. He left the house, leaving behind his security stick (see photo P5–11). SP11 stated that he was then in a state of panic and informed his superior Mr. Siva and the condominium management, one Mrs Reena.

[38] At 5.15am SP11 said the police arrived. One Insp Mohan (not called as a witness) interviewed him for ½ hour and recorded his statement. The said police officer took his statement in writing. He did not tell Insp Mohan that he had seen the accused and the deceased talking to the four persons in the Kancil, although he agreed with counsel that that would have been the first opportunity for him to do so. Later, on a date SP11 could not recall, he was asked to go to Balai Polis Brickfields where he gave a statement to the investigation officer, ASP Shahrul. In that statement too he did not make any reference to the accused. SP11 was remanded by the police from 17 December 2003 to 20 December 2003. Whilst under remand he was questioned by 3 police officers. Half an hour after his release on 20 December 2003 a third statement was taken from SP11 by Insp Nachimuthu. In this statement SP11 made a reference to the accused. One Chief Inspektor Nachimuthu a/l Muthapen was called by the prosecution as SP32. His evidence is however merely a formal one, in respect of his handling of some exhibits and bringing 3 suspects to Dr Hamidah (SP33) for specimen collection. No questions were asked by the prosecution or the defence whether he was the same Insp Nachimuthu who took SP11's third statement, as referred to by SP11. Because of that, this crucial aspect of the narrative remained unexplained and not proved by the prosecution. The Court also could not assume that SP32 is the same Insp Nachimuthu alluded to by SP11, as the officer who recorded his statement.

[39] SP11 further recounted under cross-examination, that on 4 December 2003, he saw the accused and the deceased walking into the condominium at 2am and that the accused left, alone, at 3am. He stated that he told the police in his first two statements of this sighting. When put to him that the police kept on insisting that he was mistaken about seeing the accused on 4December 2003 and that he had actually seen him on 5 December 2003, SP11 disagreed with learned counsel and said that he voluntarily told them so. When further questioned what made him tell that to the police SP11 replied "They kept repeating. After recalling everything I told them whatever I know" (see p 95D NOE). He also disagreed with learned counsel when it was put to him that he decided to point his finger at the accused because he himself had been accused of murder. He however agreed that it took him the period from 5 December 2003 until 19 December 2003 to recall about his sighting of the accused on 5 December 2003. SP11 also stated that he however had not volunteered to give that information to the police when the second statement was recorded from him on 17 December 2003.

[40] On the night of 17 December 2003 when SP11 was taken into custody by the police he was shown a photograph of the accused in full and was

asked by one Insp Vijay if he could recognize the accused. SP11 answered he could not. However after being incessantly questioned by Insp Vijay and ASP Shahrul, SP11 finally said that he knew the accused. When asked by learned counsel why he was not able to initially identify the accused from his photograph SP11 answered "I cannot give a reason" and when further suggested that if he could not identify the accused from the photograph, then he also cannot identify him on 5 December 2003 his answer was "I cannot answer that" (see p 114 C–D NOE). SP11 blatantly admitted in Court that he was lying to the police on the first four or five occasions when he was shown the photograph of the accused, that he did not know the accused. When asked whether his first and second statements to the police represented the truth as to what happened on 5 December 2003, he replied that only the third statement was true. When further asked whether the first two statements were then false, when he told the police that he had not seen the accused and the deceased on 5 December 2003, his curt reply was "I cannot answer that" (see pp 114F to 115A NOE). SP11 however stated that he was not lying in court. Another petulant example of SP11's admission came out from this blunt answer when the following question was posed to him (p 117C NOE):

> "S: You were lying to the police from the morning on 5 December 2003 when you could have identified the accused until you were arrested and decided to tell the truth?
>
> J: Yes."

When re-examined by the learned deputy on why he had not told the police that he saw the accused that morning of 5 December 2003 itself, SP11 replied that he was in a "panic mood" and that he could not "speak nicely" (see pp 131G and 132B NOE). He also stated that he felt relieved after having told the police the truth.

[41] Not unlike SP10, SP11 had been assertive in certain recollection of his memory particularly on the events of the early morning of 5 December 2003. He was emphatic on his recollection of the times those events took place, e.g. at 1am he saw the accused walking in with the deceased (see pp 97D and 101E NOE), that he saw Nor Azora and Kenneth returning at 4.00 a.m. that morning (see p 90F NOE); that the police were at the condominium at 5.15am (see p 91D NOE), that Kenneth called the police at 4.30am and that the police arrived before 5am (see p 108 B & C NOE). He also answered confidently to the learned deputy that he had seen the accused roughly 20 to 30 times for the two months before 5 December 2003 (p 85A NOE) and that the accused would arrive between 1am to 2am (p 85 NOE) and that on 4 December 2003, he recalled seeing the accused and the deceased walking in at 2am and that the accused left at 3am (see p 95A NOE). He was also positive in his answers to seeing the accused and the deceased talking to the four persons in the Kancil. Similarly he was also certain of the colours of the apparels worn by the accused and the deceased, and also the Kancil car that he said he saw on 5 December 2003. This confidence however lagged in his answers to the important and crucial issue as to why he had not informed the police, even at the first opportunity when interviewed by Insp Mohan at 5.00 a.m. on 5 December 2003 itself, that he saw the accused together with the deceased on that fateful morning. And it took him until his subsequent

arrest on 17 December 2003 to disclose "the truth" to the police. In the process of recalling the sighting of the accused on that morning, SP11 had the audacity of admitting that he had lied to the police earlier, in his previous two police statements. In view of his wanton lie, this court is of the considered view that it should be most cautious in assessing SP11's narrative on this much disputed issue.

[42] After having seen SP11's demeanour and having appraised his oft-doubtful responses on this crucial aspect, I am of the view that SP11 had not been a truthful witness. His explanation that he was in such a "panic mood" to even inform the police on that morning itself, that he had seen the accused together with the deceased, is to this court, implausible and unacceptable. Considering that he was the person in charge of the security team that night, surely an important event on the sighting of the accused together with the deceased would not have so easily slipped his mind, especially merely minutes after the discovery of the deceased's body. And surely too he could have easily recalled his sighting of the accused with the deceased that early morning and informed the police of it, prior to his subsequent arrest and without the strain of those persistent questionings by the police. Thus even without his open admission in court that he had previously lied to the police, it is my finding that SP11 is an unreliable witness whose credibility was put in much doubt by his own words and performance whilst giving evidence in this court.

EVALUATION OF SP10'S AND SP11'S EVIDENCE

[43] The evidence of both SP10 and SP11 were harmonious on the aspect of sighting the accused and the deceased coming into the condominium together at 1am on 5 December 2003. Both had been positive of seeing them, although SP11 stated that he had not seen them exiting the condominium to meet up the four persons at the Kancil, even though he was then standing at the entrance gate. Learned counsel during submission had adverted to some contradictions in both their testimony e.g., the different top worn by the deceased; SP10 saying it was a loose long T-shirt and SP11 saying that it was a sleeveless T-shirt; the colour of the accused's T-shirt, that both accused and the deceased walking in holding hands according to SP11 whilst SP10 said that they walked one behind another. These contradictions according to learned counsel although seemingly minor on their own, show that they were divergent in details because their evidence were cooked-up stories, made up by both witnesses under constant and incessant questioning by the police who wanted them to agree that they had sighted the accused together with the deceased at 1 a.m. on 5 December 2003 and not the morning before ie at around 2 a.m. on 4 December 2003 as they had already informed the police in their earlier statements. As such, the discrepancies became material in this Court's assessment of these witnesses' evidence. this court agrees with this view taken by learned counsel on this aspect of the contradictions in their evidence and found this to be an instance exemplifying the untruthfulness of both SP10 and SP11.

[44] This court had had the benefit of seeing and hearing both these witnesses and their performances can only be concluded as one abhorrent

harmonious lie on this crucial aspect of the evidence, which must be absolutely rejected. It goes without saying that this court is duty bound to separate the chaff from the grain and must be most careful and circumspect in the face of the evidence adduced by these two dubious witnesses.

[45] It would be apt at this point for me to mention certain aspects of the prosecution's case which I found to be unsatisfactory and creating gaps in its case. Firstly, it was stated by both SP10 and SP11 that at the earliest opportunity ie at about 5am on 5 December 2003, not long after the discovery of the deceased's body, some police officers had arrived at the condominium and had taken statements from these two witnesses. According to SP11 more than 10 police personnel and officers arrived early that morning in 3 cars and vans. The police dog unit was also present at the scene. SP11 also said that one Insp Mohan had questioned him there for ½ hour and recorded his statement and he had told Insp Mohan that he had not seen the deceased with anyone on 5 December 2003 (see pp. 91, 109 and 110 NOE), nor about the incident that the accused and the deceased had met up with the four persons in the Kancil. Incidentally, these four persons remained untraced until the trial. An event of this importance could not have slipped the mind of these witnesses. Furthermore, it could be logically inferred that the police officers who conducted their initial investigations and specifically Insp Mohan who recorded SP11's statement, would have asked SP11 on his sightings early that morning. In any event, SP11 himself, as earlier mentioned in this judgment admitted under oath that he had lied to the police when he gave that statement and in saying that he had not seen the deceased together with the accused at 1.00 a.m. on 5 December 2003. Why the need to tell this lie to the police had left this court searching for the real answer. According to SP11 he was then in a 'panic mood' and explained that after he saw the deceased's body he had already panicked (see pp. 131 and 132 NOE). this court found that explanation to be both unimaginative as it was untruthful. The defence had put its case that Insp Mohan had asked SP11 whether he had seen the deceased with anyone that night and that Insp Mohan had taken statements from all the other guards that morning. However Insp Mohan was not called to testify on this important aspect of the evidence, leaving, in my judgment, a lucid gap in the prosecution's case.

[46] SP11 also admitted to lying to the police when he was asked by the investigating officer (SP29) on whether he could recognise the accused from his photograph. SP11 told them for some four times that he could not recognise the accused and then finally said he recognised him. The first four answers according to SP11 was a lie (see p 115D NOE).

[47] Faced with these two glaring admissions by SP11 that he had previously lied to the police, this court was left with no choice but to reject his evidence on this crucial aspect on his sighting of the accused with the deceased on the early morning of 5 December 2003 as one coming from the mouth of an unreliable and untruthful witness. this court could not accept his explanation on why he had chosen to lie to Insp Mohan when the latter took his statement soon after the recovery of the deceased's body. There was, in my view, absolutely no reason for him to lie to Insp Mohan. Furthermore Insp Mohan had recorded a statement from him, presumably under s 112 CPC, and must

have told SP11 that he was duty-bound to tell the police the truth. And for SP11 to say in Court that this testimony now was the truth as to what he had seen, is to belittle and ridicule this court of its comprehension of the truth.

[48] As regards SP10, he had stated that his memory as to the true events of the early morning on 5 December 2003 only flashed back when he had had the opportunity to recall them from 5 December 2003 until 18 December 2003. Firstly, it must be said that that took a long time indeed! Secondly, an event as important as the sighting of the accused walking together with the deceased, only a few hours before the deceased's death surely could not have slipped the mind of SP10 who it must be remembered, was a security guard on duty at the guardhouse that early morning. Thirdly, it is highly implausible for this court to accept that SP10 had not informed the police of his sighting of the accused and the deceased, when he was questioned about the deceased's death almost immediately after her body was recovered. It must be remembered that SP10 stated that he was upset on the news of the deceased's death. In my evaluation of his evidence, I found SP10 to also be an untruthful witness and reject his evidence regarding his sighting of the accused and the deceased on the morning of 5 December 2003.

[49] SP10 had told the police on a number of occasions that he had not seen the accused on 5 December 2003 (see p 66 NOE), nor had he seen the accused with the deceased on that date (see p 67D NOE). After recalling what he saw he decided to change his previous statements to the police and informed his superior, one Mr. Siva about his. Unfortunately Siva too was not called to testify on this crucial aspect of the evidence. this court is well aware that the prosecution is entitled not to call witnesses and that the exercise of this prerogative could not be looked upon unfavourably by the Court. However in view of the incessant challenge by the defence that SP10 had come to court to concoct his narrative about his sighting of the accused together with the deceased, it is in my view, needful for the prosecution to have called Siva to close any gaps created by the testimony SP10.

[50] This was a case in which the credibility of these two star witnesses for the prosecution was of major importance. Any gaps on their narrative on this crucial aspect of their narrative on their observation must be fully scrutinised by this court even at this stage of the proceedings.

[51] In my assessment of these two witnesses I am guided by the principles laid down in *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105 and *Mohamed bin Kasdi v Public Prosecutor* [1969] 1 MLJ 135. In the first case Thomson CJ had stated that —

> "If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinized with great care and indeed with suspicion."

[52] In the second case above, it was held by Ali J that —

> "No hard and fast rule can be laid down for determining the credibility or otherwise of a witness, but when a witness gives or makes two statements which differ in material particulars there must necessarily be ground for believing that he is not a truthful witness."

In this case both SP10 and SP11 had incredibly changed their earlier statements to the police on the most crucial aspect of this case, for reasons which are neither believable nor acceptable to this court; not counting their legal duty to state the truth to the police under s 112 of the Criminal Procedure Code.

EVALUATION OF THE SCIENTIFIC EVIDENCE

[53] This court's evaluation on these scientific evidence brought out the following findings:

1. That the deceased died of asphyxia due to choking. There was no sign of any struggle found on the deceased's body.
2. That the accused and one unknown male had had sexual intercourse with the deceased within 72 hours of her death. The deceased died after the act of sexual intercourse.
3. Anal intercourse was performed on the deceased by the unknown male. The fresh tear and bleeding of the deceased's anus showed that this act had taken place within 72 hours of her death.
4. The electrical cord (P17A) and the bra (P82) used to tie up the deceased contained the DNA profiles of the unknown male and the deceased. The act of tying the deceased's legs was done after her death (pp. 187 and 188 NOE).
5. The hairs recovered from the deceased's bedsheet and comforter matched the DNA profile of the same unknown male.
6. The simple test conducted by SP14 on the crumpled tissue papers (P29) could not with certainty say that the accused was the last person to have had sexual intercourse with the deceased.
7. The fingernail clippings of the deceased revealed the presence of the DNA profiles of both the accused and the unknown male, proving that she had come into contact with both men.
8. The face towel (P16A) that dropped out of the deceased's mouth contained the DNA profiles of the accused, the deceased and an unknown female.

It may be pertinent to also mention at this point that there were no fingerprints marks of anyone, including that of the accused, found from the deceased bedroom or the house.

[54] From the above, this court had come to an affirmative conclusion that the scientific evidence standing alone had not enabled the prosecution to establish at this *prima facie* stage of the proceedings that the accused person was responsible for this murder. It did not even establish that the accused was the last person to have been with the deceased. Quite the contrary, it is my finding that the person identified as Unknown Male 1 was in all likelihood that last person. This is evident from the opinion of SP13, which this court accepts, that the knot tied around the deceased feet was done after her death. Now, the materials used for tying those knots ie the electrical cord and the brassiere were found to carry the DNA profile of that unknown male person.

The logical inference and in fact, the only one, that this court makes is that that unknown male was the last person to be in physical contact with the deceased. This fact, as crystallized by the prosecution's own witness, stood out like a sore thumb in the narration of its case. In coming to this conclusion this court also takes into account the fact that the unknown male also had both vaginal and anal sexual intercourse with the deceased within 72 hours of her death. It was also not proven that the accused was indeed the last person to have had sexual intercourse with her, although sexual intercourse did take place between the accused and the deceased within 72 hours of her death.

PRIMA FACIE CASE

[55] At the conclusion of the prosecution's case, this court is now charged with a duty to consider whether the prosecution has made out a *prima facie* case against the accused (s 180 CPC). Although the meaning of '*prima facie*' is not defined, this court is now guided by case law authorities, notably the Court of Appeal's decision in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 which discussed various cases and held that the test should be as follows:-

> "The correct test to be applied in determining whether a *prima facie* case had been made out under s 180 of the Criminal Procedure Code (and this would apply to a trial under s 173 of the Code) was that as encapsulated in the judgment of Hashim Yeop Sani FJ (as he then was) in *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor.* Therefore, a judge sitting alone under s 180 of the CPC must subject the prosecution evidence to maximum evaluation and to ask himself the question 'If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case?' If the answer was in the negative, then no *prima facie* case had been made out and the accused would be entitled to an acquittal. Subjecting the evidence of the prosecution to maximum evaluation to determine if the defence was to be called did not mean that the prosecution had to prove its case beyond a reasonable doubt at this intermediate stage."

At p 83 of the report the Court of Appeal through Gopal Sri Ram JCA said this:-

> "In *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 63, Augustine Paul J made the following observation which has since received approval *sub silentio* from the Federal Court (see [2002] 3 MLJ 193):
>
> > A *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a *prima facie* case has been made out in order to call for the defence.
>
> In our judgment, the foregoing passage correctly states the law as it presently stands. But, we would emphasize and make it amply clear that there is no burden on the prosecution to prove its case beyond a reasonable doubt at the close of

the prosecution's case. Whether it has done so, is a question that must be dealt with at the close of the whole case." A

After a lengthy discussion of the Federal Court decision in *Arulpragasan Sandaraju v Public Prosecutor* [1997] 1 MLJ 1 the Court of Appeal came to the following conclusion (p 80 of the report):-

"Both the majority and minority insist on a maximum evaluation of the prosecution evidence at the close of the prosecution's case. If there are gaps in the evidence (see *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16) or the evidence admits of more than one inference (Kasmin bin Soeb) then, applying either the view of the majority or the minority in *Arulpragasan*, the result would be the same in that the accused would be entitled to an acquittal at the close of the prosecution's case. B

In our respectful view, the correct test to be applied in determining whether a *prima facie* case has been made out under s 180 of the CPC (and this would apply to a trial under s 173 of the CPC) is that as encapsulated in the judgment of Hashim Yeop Sani FJ (as he then was) in *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at p 270: C

To summarise, it would therefore appear that having regard to the prosecution evidence adduced so far, a *prima facie* case has not been established against Nordin Johan and Aziz Abdullah, the second accused and the fourth accused which, failing their rebuttal, would warrant their conviction. In other words if they elect to remain silent now (which I hold they are perfectly entitlted to do even though they are being tried under the Emergency Regulations) the question is can they be convicted of the offence of s 302 read with s 34 of the Penal Code? My answer to the question is in the negative." D E

And, in order to determine whether a trial judge as trier of facts and law is satisfied that the prosecution has successfully establish a *prima facie* case, the Court of Appeal set out the following advice (at p 81 of the report):-

"It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no *prima facie* case has been made out and the accused would be entitled to an acquittal." F

[56] The accused stood charged of murder. The prosecution must therefore prove the following ingredients: (see *Ratanlal And Dirajlal's Law Of Crimes* — Cap XVI – p 1442) G

1. that the death of Noritta had taken place;
2. that her death had been caused by or in consequence of the act of the accused; and H
3. such act was done with the intention either of causing death or of causing bodily injury sufficient in the ordinary cause of nature to have caused her death.

The first ingredient was proven beyond dispute. For the second and third ingredients the prosecution had adduced circumstantial evidence to raise a *prima facie* case against the accused which the learned deputy public prosecutor in his submission summarised as follows:- I

1. That there was no sign of any break-in into the deceased house suggesting that her killer was someone known to her.

2. The accused had an intimate relationship with the deceased and had access to her house.

3. The accused was the last person seen with the deceased and was the last person to have had sexual intercourse with her.

4. The DNA profile of the accused present in the face towel (P16A) is proof that he was responsible for choking the deceased.

5. The accused's physique and weight fits into the description by SP13 that some of the bruises found on the deceased were caused by the weight of a heavy person pressing onto her body.

6. The accused's height enabled him to climb over the wall at the back of the condominium compound to escape after committing the murder.

7. The conduct of the accused in shaving off his pubic hair and clipping his fingernails before giving himself up showed his anxiety and should be viewed as making some preparations to cover his track.

[57] It was submitted by the learned deputy that the cumulative effect of those overwhelming circumstantial evidence pointed to the irresistible conclusion that the accused had committed the murder, adverting to two passages taken from the decision in *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 198:-

> "… the first question of the cumulative effect of circumstantial evidence, is as follows:
>
> 'The second question to which I must draw your attention is that the question in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime. Or is there some reasonably possible explanation such, for example — "Was it an accident?" '

The second passage is as follows:

> "Now, as I told you earlier on, one of the points about circumstantial evidence is its cumulative effect. Any of these points taken alone might, you may think, be capable of explanation. The question for you is: where does the totality of them, the total effect of them, all lead to? Adding them together, considering them, not merely each one in itself, but altogether, does it or does it not lead you to irresistible inference and conclusion that the accused committed this crime? Or is there some other reasonably possible explanation of these facts?
>
> The prosecution case is that the effect of all this evidence drive you inevitably and inexorably to the one conclusion only: that it was the accused who intentionally caused the death of this young girl."

[58] The learned deputy had correctly directed my attention to the law on circumstantial evidence by making reference to the following passages in their respective cases.

[59] In *Idris v Public Prosecutor* [1960] MLJ 296, Hill Ag CJ quoted the remarks made by the trial judge with approval, namely —

"With regard to the definition of circumstantial evidence I can give you no better definition than quote to you the words of Lord Cairns in the case of *Belhaven & Stenton Peerage* reported in 1875-6 Appeal Cases, p 279:

> 'My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.'

In other words circumstantial evidence consist of this: that when you look at all surrounding circumstances, you find such a series of undersigned, unexpected, coincidences that, as a reasonable person, you will find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps then it is of no use at all. As I have stated this case depends entirely upon circumstantial evidence."

As regards the heavy onus placed by the law on the prosecution when relying on circumstantial evidence, the following passages are definitive and this court need not add any further. In *Chang Kim Siong v Public Prosecutor* [1968] 1 MLJ 36, the Federal Court through His Lordship Pike CJ (Borneo) had stated:-

"The onus on the prosecution when the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused."

And in *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561, Edgar Joseph Jr SCJ for the Supreme Court stated similarly thus:-

"It is trite law that where the prosecution is relying on circumstantial evidence the onus upon it is a very heavy one and that evidence must point irresistibly to the guilt of the accused. If there are gaps in it then that will not be sufficient."

As for the inferences that may be made from circumstantial evidence, I am guided by the following passage from *Blackstone's Criminal Practice* 1991 at pp 1674–1675, referred to this court in the defence submission:-

"However, although circumstantial evidence may sometimes be conclusive, it must always be narrowly examined, if only because it may be fabricated to cast suspicion on another. For this reason, it has been said that:

It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference (*Lejzor Teper v The Queen* [1952] AC 480, per Lord Normand at p 489)."

Mohd Azmi SCJ in *Ng Thian Soong v Public Prosecutor* [1990] 2 MLJ 148 also made similar remarks on this matter, saying —

"But be that as it may, these authorities do not relieve the trial judge from the duty to make a balanced direction to the jury on other reasonable inferences that could be drawn from any particular circumstantial evidence, particularly where they are equally favourable to the accused."

And in the case of *Public Prosecutor v Sarjit Kaur a/p Najar Singh* [1998] 1 MLJ 184 the learned judge in similar tone held that —

> "Bearing in mind that unlike statutory presumption, there is no shift in the burden of proof on the prosecution where the evidence is circumstantial, it is necessary for the trial judge not to give the impression that there need only be one inference that can be drawn from every circumstantial evidence. The principal circumstantial evidence in the present case are clearly open to more than one reasonable or plausible inference, and failure to put them squarely to the jury would in the circumstances occasion a miscarriage of justice … . It should also be pointed out that circumstantial evidence does not depend on hypothesis, or theories, or even speculations. They must give rise to strong inferences so as to become the best evidence."

[60] Thus, in determining whether at this stage of the trial, a *prima facie* case has been made out by the prosecution, this court is obliged to scrutinize these circumstantial evidence on a maximum evaluation yardstick in order to determine if those strands of evidence have satisfied the legal requirements to support a finding of a *prima facie* case. And in doing so, it becomes necessary for this court to consider the gaps and inferences that arose from those circumstantial evidence, in accordance with the principles as discussed earlier.

[61] I have already given my reasons why I rejected the story of the prosecution's star witnesses, SP10 and SP11, on their evidence of the accused being the person last seen together with the deceased. Now, even if their evidence were accepted by this court, the mere fact that they were last seen together does not necessarily lead to an irresistible inference that the accused had committed this crime, although that circumstance is of an incriminating nature against the accused (see *Ratanlal and Dirajlal's Law of Crimes*, 24th Edn p 1378). There must be other circumstances that may go to show that the accused alone had committed this murder. These came in the form of the scientific evidence adduced by the prosecution. Alas, these evidence too fell short of the standard needed even at establishing a *prima facie* case. In fact those scientific evidence, especially the existence of the "Unknown Male 1" being seemingly the last person to have been with the deceased, were laden with doubts, besides the inferences this court had found to be favourable to the accused. It is trite law in any criminal trial the defence is entitled to punch holes and create doubts even at the prosecution stage. In this case, I found that the defence needed little effort to do so because, in my view, the scientific evidence on their own were destructive of the prosecution's case.

[62] The doubts in the prosecution's case and the inferences favourable to the accused did not just stop there. The evidence of Nor Azora (SP28) and Kenneth Michael Yap (SP12) were also fraught with uncertainties in the prosecution case. Nor Azora had seen a figure of a man in her house whom she described as one unlike the accused. Both had smelt the repulsive body odour of someone and had stated that this odour was never detected of the accused on the occasions of his physical presence with them. Learned deputy had in submission, stated that the accused could have emitted this odour because his body was in a sweaty state after perspiring from his acts of having sexual intercourse and then murdering the deceased. I find this submission to be pure conjecture, as was the defence submission that the police were concealing certain facts from this court in order to protect a certain dignitary involved in this crime, which I find also as mere speculation not supported by even an iota of evidence. The presence of this mysterious dark skinned man in the house immediately after the deceased's body was recovered had

left a serious doubt as to whether it was the accused who had perpetrated this crime. At the earlier stage of the police investigation into this crime, the Officer in Charge of Criminal Investigations (OCCI) Kuala Lumpur, (now the Deputy Chief Police Officer of Trengganu) had issued a statement that the police was looking for a dark skinned suspect of 170cm (5' 6") in height (the accused is 6' 3" tall), with long hair. When the IO (SP29) was asked of this information from his superior to the press, SP29 stated that he knew of the OCCI's statement only through the newspaper and did not know where the OCCI had received that lead on the person the police were looking for and that he (SP29) did not follow-up the lead that the OCCI had spoken off. I find this explanation quite extraordinary and exceptional coming from an investigating officer of a very serious crime and giving almost nonchalant answers to an important lead on the case made by the most senior officer in criminal investigations (see p 396 NOE). The said OCCI was also not called by the prosecution to explain if that person the police were looking for was the same mystery male that Nor Azora had earlier seen running away from the scene of crime, thus in my view, leaving yet another gap in the presentation of the prosecution case. From these facts it may also be inferred that that person the police were looking for was indeed a suspect in this murder and could be the same person that Nor Azora had mentioned in her testimony. These gaps and inferences must at this stage, in determining a *prima facie* case, be considered by the court and I found them in favour of the accused.

[63] In an unprecedented move to salvage the damage caused by Nor Azora and Kenneth's evidence, the learned deputy had submitted that that mystery male could well be the accomplice of the accused in committing this murder. This court rejected this suggestion as unrelated to this charge against the accused who stood charged, alone, of this murder. As was correctly pointed out by learned defence counsel there was "not even a whisper that the accused had an accomplice" throughout the narration of the prosecution's story and in the opening speech by the learned deputy.

Motive For The Murder

[64] In his opening speech under s 179 of the Criminal Procedure Code, the learned deputy had stated that the prosecution would adduce evidence of jealousy as a motive for the accused to commit this crime. Evidence of SP6, Lim Sin Kean Childs, was introduced towards this end. SP6 had a very close relationship with the deceased and had been to the deceased house only once, that too in the presence and at the invitation of the deceased's mother. This was the occasion when the deceased, her mother and sister had taken a ride from SP6 to and from Singapore. In spite of suggestion by the defence that he had a sexual relationship with the deceased, SP6 stood firm, as he had done earlier when the police asked him similar questions, that his relationship with the deceased was platonic. I accepted this, and more, I found that SP6 and the deceased merely had a professional and casual relationship. They met often, mostly at the cafes in Sri Hartamas and talked about their work. From his facial expressions, I found SP6 to be a person caring of the deceased and fond of her but there was absolutely no evidence that he was her lover. The prosecution's submission that the deceased had two lovers simultaneously,

is thus merely pure speculation. His wife knew of their relationship. There was also no evidence that he was even her special boyfriend, to excite the accused's feeling of jealousy. In fact there was not even an iota of evidence that the accused knew of their friendship. During this time however, the accused remained the deceased's special boyfriend and frequently visited her at her house in the early mornings, at least twice weekly maintaining an intimate relationship with her. The accused, in my view, held a special and dear place in the deceased's heart. She had a photograph of the accused kept in her mobile phone which she had proudly showed to her aunt (SP3) and had unabashedly introduced the photograph as her friend by mentioning the accused's name (p 5 NOE). Against this background, I could not find anything in the prosecution evidence to show that the accused had been jealous of SP6. Even if the accused knew of the deceased's relationship with SP6, there were no reasons for him to have felt jealous of SP6. There was also absolutely no evidence that the accused was a person who is prone to jealousy or had such a disposition.

[65] In a criminal prosecution, motive behind a crime is a relevant fact on which evidence can be given. It is a sentiment which provokes a person to form an intention. In *Ratanlal and Dirajlal's Law of Crimes*, 24th Edn p 1391, the learned authors made this comment —

> "Proof of motive satisfies the judicial mind about the authorship of the crime but the absence does not ipso facto result in the acquittal of the accused. Motive is not a sine qua non to prove the case of the prosecution. Absence of proof only demands deeper forensic search and cannot undo the effect of evidence if otherwise it is reliable and sufficient."

[66] It is not incumbent upon the prosecution to prove the motive for a crime. However if the crime is alleged to have been committed for a particular motive, as is the case here, it is relevant to inquire whether the pattern of the crime fits in with the alleged motive. Where a case is based on circumstantial evidence the motive for committing that crime assumes greater importance. It is certainly an important strand of circumstantial evidence to impute the accused's guilt (See *Public Prosecutor v Sarjit Kaur a/p Najar Singh* [1998] 1 MLJ 184). Two leading cases where motive was established to form that strand of circumstantial evidence are *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195 and *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, where it was said by Abdoolcader FJ at p 282:-

> "Although motive is not a necessary ingredient to be established in the offence of murder, it would if shown tend to support the case against an accused so charged."

In this case the prosecution alleges only one motive, that of jealousy which the court found to be non-existent. In a situation such as this, where the prosecution had failed to lead such evidence proving the accused's motive, this court will have to closely and carefully evaluate the other evidence bearing on the guilt of the accused, (see *Ratanlal Dhirajlal's Law of Crimes*, 24th Edn. p. 1392), which had been earlier discussed.

[67] At the conclusion of the prosecution case, this court as a decider of law needs to consider whether the prosecution has succeeded in establishing

a *prima facie* case against the accused. In so doing, this court is now bound by the maximum evaluation of the evidence yardstick as laid down in *Looi Kow Chai* to determine whether the evidence can be accepted as accurate to establish the essential elements of this offence facing the accused. In this case, not only did this court find the evidence lacking to point towards the accused as having committed this murder but that the prosecution's case itself is tainted with doubts, gaps and inferences favourable to the accused. It would be against the weight of the evidence, now considered in totality, and having considered its cumulative effect, for this court to call upon the accused to enter his defence. In short, there is in this case, no need for me to hear rebuttal evidence from the accused. I am reminded here by the words of Sharma J in *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 who said:

> "… the court is not entitled merely for the sake of joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer".

[68] I am wary of the question that begs an answer now, that is if the accused were to be called to his defence, and chose to remain silent, which he is legally entitled to, can this court on the set of facts now facing it, convict him and pronounce the death sentence upon him? The resounding answer here is an emphatic no!

[69] It must also be remembered that the evidence that I have evaluated is based on the narrative of the prosecution's own witnesses. It is trite law that the prosecution is bound by that evidence. As stated by Gopal Sri Ram JCA in *Lim Guan Eng v Public Prosecutor* [1998] 3 MLJ 14 at p 47 —

> "Now, among the general rules that govern judicial appreciation of evidence in both civil and criminal causes in the adversarial system of justice, there is one of fundamental importance. It is that a party is bound by the evidence of witnesses whom he calls in proof of his case. See *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371."

[70] For these reasons, I had found that the prosecution had failed to establish a *prima facie* case; the accused was acquitted and discharged accordingly.

Accused acquitted and discharged.

Reported by Mariette Peters-Goh